No. 14-8358

Supreme Court, U.S.
FILED
JUL 24 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AVONDALE LOCKHART,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

EDWARD S. ZAS
Counsel of Record
BARRY D. LEIWANT
DANIEL HABIB
DARRELL B. FIELDS
FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8742
edward_zas@fd.org

Counsel for Petitioner

DAVID A. LEWIS
Of Counsel

259963

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Section 2252(b)(2) of Title 18, U.S.C., requires a District Court to impose a sentence of at least ten years of imprisonment for the offense of possessing child pornography if the defendant has a qualifying prior conviction, including a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward[.]"

The question presented is whether § 2252(b)(2)'s mandatory minimum penalty is triggered by a prior state conviction "relating to" "aggravated sexual abuse" or "sexual abuse" even though the conviction did not "involv[e] a minor or ward."

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The Second Circuit's opinion is reported at 749 F.3d 148 and appears at JA 9–24. The transcript of petitioner's sentencing proceeding in the Eastern District of New York appears at JA 43–55.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on February 13, 2013. JA 25. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, issued its opinion on May 15, 2014, and denied rehearing and rehearing en banc on October 16, 2014. JA 8–9. A timely petition for certiorari was filed on January 14, 2015, and granted on May 26, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns § 2252(b)(2) of Title 18, U.S.C., which provides in relevant part:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if ... such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the

> production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Section 2252 is reproduced in full, along with the other relevant statutory provisions, 18 U.S.C. §§ 2251 and 2252A, in the statutory appendix annexed to this brief. App. 1a–20a.

STATEMENT OF THE CASE

A. Introduction

Federal criminal law prohibits the production, distribution, receipt, and possession of material showing minors engaging in sexually explicit conduct, commonly known as child pornography. *See* 18 U.S.C. §§ 2251, 2252, 2252A. Simple possession of such material, the least serious federal crime relating to child pornography, ordinarily carries no minimum term of imprisonment and a ten-year maximum. *See* § 2252(b)(2). But § 2252(b)(2) mandates a prison term of not less than ten years (and doubles the maximum term to twenty years) for offenders who have certain prior convictions, including "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."

Petitioner pleaded guilty in federal court to one count of possessing child pornography. He had no prior

conviction "involving a minor or ward." But the District Court concluded that § 2252(b)(2)'s enhanced penalties nevertheless applied because petitioner had a decade-old New York State conviction for sexually abusing his 53-year-old girlfriend, for which he received probation. The District Court therefore sentenced petitioner to the ten-year mandatory minimum term. The Court of Appeals affirmed, holding that the phrase "involving a minor or ward" modifies only the immediately preceding phrase "abusive sexual conduct."

This Court should reverse. The most natural reading of the statutory language, construed in light of this Court's precedents, the statutory context, its overall structure, and its history, is that the three enumerated categories of wrongful sexual behavior in § 2252(b)(2)—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct"—constitute a single, integrated list of closely related and overlapping terms, all introduced by the broadening term "relating to." The modifying phrase "involving a minor or ward" thus applies to the entire series. This interpretation accords with ordinary English usage and represents a straightforward application of the familiar rule of syntax known as the "series-qualifier" principle. Petitioner's reading finds additional support in the Department of Justice's own contemporaneous understanding of the statutory text, which Congress shared. At the very least, the statute is ambiguous and therefore must be construed in favor of lenity.

B. Factual Background

In 2010, federal law enforcement agents targeted petitioner in a sting operation. Immigration and Customs Enforcement agents and United States Postal Inspectors mailed a letter to petitioner's home in Brooklyn, New York, inviting him to purchase child pornography through a government-run website or mail-order catalog. Petitioner ordered six DVDs of children engaged in sexually explicit conduct, paying with a $125 money order. When petitioner accepted delivery of a package said to contain the videos, agents executed a warrant to search his home. They recovered nine videos and numerous images containing child pornography from the hard drive of petitioner's laptop computer. *See* Presentence Investigation Report ("PSR") ¶¶ 3–23.

Petitioner was 46 years old when arrested. He was born in Dominica and has lived in the United States Virgin Islands and the continental United States as a lawful permanent resident since he was seven years old. He lived principally in the New York City area and worked as an aerobics instructor and bus driver until kidney disease, caused by years of heavy drinking, left him disabled. In 2007, petitioner underwent a kidney transplant and was homebound during his convalescence. Though he had maintained several long-term romantic relationships with women in the past, petitioner's illness kept him from engaging in sexual activity. While recuperating at home, petitioner bought a computer, his first, and grew addicted to readily available Internet pornography. Initially, petitioner viewed only adult pornography, but later began viewing child pornography as well. *See* PSR ¶¶ 53–64, 67–69, 74–81. Nonetheless, petitioner has

never had sexual contact with a child. And a psychiatric evaluation prepared in connection with his sentencing concluded that petitioner was "not a pedophile, ... nor does he have any other paraphilia or hypersexual disorder." Indeed, the evaluating psychiatrist opined that petitioner "is aging and has severe kidney disease, both of which reduce his sexual drive, and ... his risk of another sexual crime is remote." PSR ¶ 73.

C. District Court Proceedings

Petitioner pleaded guilty in the Eastern District of New York to simple possession of child pornography, in violation of § 2252(a)(4)(B). Without regard to any mandatory minimum, the PSR calculated a Sentencing Guidelines range of imprisonment of 78–97 months. PSR ¶ 88. But the PSR also noted that in 2000 petitioner had pleaded guilty to sexual abuse in the first degree, in violation of N.Y. Penal Law § 130.65(1), which provides: "A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact ... [b]y forcible compulsion." JA 11. According to the PSR, an arrest report in that case alleged that petitioner pinned down his 53-year-old girlfriend and attempted to penetrate her. The state court sentenced petitioner to five years' probation, which he successfully completed. PSR ¶¶ 47–48. The PSR concluded that petitioner's New York State conviction for sexual abuse was a "conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," subjecting him to a ten-year mandatory minimum prison sentence. *See* PSR ¶ 87 (citing § 2252(b)(2)).

At his federal sentencing, petitioner objected to the application of the ten-year mandatory minimum, arguing that his New York State conviction was not a qualifying predicate because it did not "involv[e] a minor." JA 45. The District Court (Johnson, J.) disagreed, ruling that "the plain reading of the statute negates that particular position" because petitioner's offense "fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse." JA 45. The court sentenced petitioner to 120 months. JA 27.

D. The Second Circuit's Decision

The Court of Appeals (Katzmann, C.J., joined by Straub and Lohier, JJ.) affirmed. JA 9–24. The court held that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," so that a conviction under state law "relating to" "aggravated sexual abuse" or "sexual abuse" is a § 2252(b)(2) predicate even if no minor or ward was involved.

The Second Circuit decided that the "plain meaning" of the statute "is not pellucid," and thus considered "which rule of statutory construction should inform our understanding ... : the last antecedent rule or the series qualifier canon." JA 14. "Under the last antecedent rule," as urged by respondent, "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." JA 14 (internal quotation marks omitted). In contrast, the "series qualifier canon of statutory construction," as urged by petitioner, "provides that a modifier at the beginning or end of a series of terms modifies all the terms." JA 15 (internal quotation marks omitted). The court concluded that "based

on the language and structure of this statutory phrase alone," neither canon applied "unambiguously." JA 16.

Given this "lingering ambiguity," the Second Circuit said it could not resolve the appeal "by applying the canons" to the statutory text. JA 19. Accordingly, it turned to "the remainder of § 2252(b)(2) and ... its overall scheme." JA 19. The court noted that § 2252(b)(2) provides that the enhanced penalties are also triggered if the defendant has a prior conviction for certain federal crimes, and that some of those crimes can be committed against either children or adults. The court decided that "'it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law.'" JA 20–21 (quoting *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011), and collecting cases from the Fifth, Seventh, Ninth, and Eleventh Circuits). The Second Circuit decided that "[t]his reasoning" (demonstrably incorrect, as we show *infra* pp. 22–27) "compels us to conclude that 'involving a minor or ward' modifies only prior state convictions for 'abusive sexual conduct,' not those for 'sexual abuse' or 'aggravated sexual abuse,' each of which would constitute a predicate *federal* offense if committed against an adult or a child." JA 21.

Petitioner argued that Congress, in § 2252(b)(2), as well as in §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2), had consistently limited the state-law predicate convictions to offenses involving minors, while the federal-law predicates included the same crimes involving both adults and children. Thus, he contended, Congress likely intended the same limitation to apply to state-law convictions

for "aggravated sexual abuse" and "sexual abuse." For example, several penalty sections, including § 2252(b)(2), count among the triggering offenses prior federal convictions under chapter 71 of Title 18 (which pertains to obscene matter involving adults and children), while limiting the comparable qualifying state-law offenses to "child pornography." *See also* §§ 2252(b)(1), 2252A(b)(1), 2252A(b)(2) (same).

While acknowledging that "there is some logic to this position," the court did not find it "more reasonable than the *assumption* that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law." JA 23 (emphasis added).[1] The court also rejected legislative history stating that the enhancement would apply to "a repeat offender with a prior conviction under ... any State child abuse law," solely because that history was "brief." JA 24. Finally, the court rejected the rule of lenity as inapplicable. JA 24.

SUMMARY OF ARGUMENT

I. The most natural reading of "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," is that the final phrase, "involving a

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1. The court also felt that petitioner's interpretation was "undermined" because chapter 109A of Title 18 includes crimes titled "aggravated sexual abuse" (§ 2241), "sexual abuse" (§ 2242), and "sexual abuse of a minor or ward" (§ 2243), only one of which is limited to child victims. The court theorized (again incorrectly, as we show *infra* pp. 35–38) that "Congress intended to impart a similar structure" to § 2252(b)(2). For that reason, the court said, "the pattern Lockhart perceives among other state-law offenses does not necessarily apply here." JA 23.

minor or ward," modifies the entire preceding series. This interpretation comports with ordinary English usage, as reflected in the "series-qualifier" principle of syntax, which this Court has long applied to statutory lists like this one. The series-qualifier principle applies here because the final modifier, "involving a minor or ward," makes sense with all the elements of the series—a single, integrated list of closely related, parallel, and overlapping terms. Had Congress intended "involving a minor or ward" to modify only "abusive sexual conduct," the text could have been drafted to say so. Accordingly, the best reading of the language is that "involving a minor or ward" modifies the entire trilogy: "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

The statutory context, structure, and history reinforce this reading. They show that, in §§ 2252(b) and 2252A(b), Congress, in every other instance where it included state-law predicates, deliberately limited those predicates to crimes against minors, even though the analogous federal-law predicates include crimes against anyone. Contrary to the Second Circuit's view, that design is reasonable and administrable.

The contemporaneous understanding of both Congress and the Department of Justice further supports petitioner's reading. When the language in dispute was first added to the U.S. Code in 1996, the Senate Report made clear that it referred to prior state convictions "under any State child abuse law," not laws involving adult victims. And in 1998 the Department of Justice likewise construed the same language to cover "prior state convictions for child molestation."

The Court of Appeals, in holding that "involving a minor or ward" modifies only "abusive sexual conduct," committed a series of errors. The main rationale for the court's decision was its assertion that it would be "unreasonable" to conclude that Congress intended to treat prior federal and state convictions for the same conduct differently. JA 20. Congress intended just that. Indeed, the different treatment of federal and state predicates is an unmistakable feature of §§ 2252 and 2252A. These provisions specify that a defendant will face an enhanced sentencing range based on certain prior federal convictions but not prior state convictions encompassing the same conduct.

II. If any ambiguity remains, the rule of lenity resolves it. In light of the series-qualifier principle, this Court's precedents, and the statute's context, structure, and history, respondent's interpretation is subject at least to serious doubt. Accordingly, the rule of lenity requires that the statute be construed in petitioner's favor. That venerable rule applies with special force to a statute such as this, which imposes severely enhanced penalties, including a mandatory minimum prison sentence of ten years. The Second Circuit's interpretation of § 2252(b)(2), "compel[led]" by an unsupported "assumption" about Congress's intent, is not unambiguously correct and therefore must yield to the reading that favors leniency for petitioner.

ARGUMENT

I. The phrase "involving a minor or ward" in 18 U.S.C. § 2252(b)(2) modifies the entire integrated list of closely related, overlapping, and parallel terms—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

The plain meaning of § 2252(b)(2)'s text, read in context and in light of the overall statutory structure, is that the limiting phrase "involving a minor or ward" modifies the entire preceding series of state sex-abuse categories: "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

A. The plain meaning of the statutory language, read in light of the series-qualifier principle and this Court's precedents, is that "involving a minor or ward" modifies all three state-law predicates.

This Court interprets criminal statutes, like all statutes, according to their plain language and "ordinary English usage." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009); *see, e.g.*, *Jones v. United States*, 529 U.S. 848, 855 (2000); *Bailey v. United States*, 516 U.S. 137, 144–45 (1995). The most natural reading of "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is that the final phrase, "involving a minor or ward," modifies all three preceding categories of state-law predicates. This reading represents a simple application of a familiar principle of syntax, sometimes called the "series-qualifier" principle:

"When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thomson/West 2012) ("*Reading Law*").

This Court has long read statutes in light of the series-qualifier principle. *See, e.g.*, *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). This Court's cases have identified two textual signals indicating that the principle applies: first, "several words are followed by a clause which is applicable as much to the first and other words as to the last," *id.*; second, "[t]he modifying clause appear[s] ... at the end of a single, integrated list[.]" *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 344 n.4 (2005). When these textual signals are present, the series-qualifier rule produces a "natural" reading. *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("'natural construction'") (quoting *Porto Rico Ry.*, 253 U.S. at 348). Indeed, in practice the rule simply comports with ordinary English usage. Because the series here meets both criteria, the natural meaning of the statutory phrase is that the final modifier—"involving a minor or ward"—applies to all the preceding terms of the series, not just the last. *See Paroline*, 134 S. Ct. at 1721; *United States v. Bass*, 404 U.S. 336, 339–40 (1971).

1. The series-qualifier principle applies because "involving a minor or ward" makes sense with all three terms in the series.

The first criterion for application of the rule, that the modifier make sense with *all* terms in the series, was set out in *Porto Rico Railway*, 253 U.S. at 348. There, this Court considered a statute that conferred jurisdiction on the District Court of Puerto Rico over cases "where all of the parties on either side ... are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." *Id.* at 346. This Court held that "not domiciled in Porto Rico" modified not only its immediately preceding referent ("citizens of a state, territory, or district of the United States") but "citizens or subjects of a foreign state or states" as well. *Id.* at 348. Justice Brandeis, writing for a unanimous Court, explained: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.*

Subsequently, in *Bass*, 404 U.S. at 339–40, this Court applied the same principle to a series similar to the one here, punishing any previously convicted felon "who receives, possesses, or transports in commerce or affecting commerce ... any firearm." This Court held that the "'natural construction of the language'" indicated that the phrase "in commerce or affecting commerce" modified all three antecedents on the list, not just "transports." *Id.* (quoting *Porto Rico Ry.*, 253 U.S. at 348). That was true, the Court reasoned, because the qualifying phrase

"undeniably applies to at least one antecedent, and ... makes sense with all three[.]" *Bass*, 404 U.S. at 339–40.

Just two Terms ago, in *Paroline*, this Court once again applied the series-qualifier principle, this time to a list of categories of losses for which restitution is payable to victims of child-pornography offenses. The list included medical services; physical and occupational therapy; transportation, temporary housing, and child care; lost income; attorney's fees and costs; and "a final catchall category for 'any other losses suffered by the victim as a proximate result of the offense.'" 134 S. Ct. at 1720 (citing § 2259(b)(3)(A)–(E) and quoting § 2259(b)(3)(F)). This Court rejected the argument, based on the rule of the last antecedent, that "as a proximate result of the offense" modified only the last enumerated category ("any other losses suffered by the victim"), and held, following *Porto Rico Railway*, that because the "proximate result" language fit each preceding element of damages, the "natural construction" of the language was that it qualified all. 134 S. Ct. at 1721.

Here, "involving a minor or ward" applies equally well to all three preceding elements, "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." The final modifier is, as this Court has noted in similar cases, "'applicable as much to the first and other words as to the last,'" *id.* (quoting *Porto Rico Ry.*, 253 U.S. at 348), "undeniably applies to at least one antecedent, and ... makes sense with all." *Bass*, 404 U.S. at 339–40. No incongruity emerges from applying the modifier "involving a minor or ward" to each preceding element of the list.

2. The series-qualifier principle also applies because the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct" constitutes an integrated list of related elements.

The series-qualifier rule also applies when the preceding series constitutes a "single, integrated list" of related elements. *Jama*, 543 U.S. at 344 n.4. In *Jama*, this Court described the series in *Bass*—"receives, possesses, or transports"—as just such an "integrated" list. *Id.*; *see Bass*, 404 U.S. at 337. The words in that list are "integrated" in function and content. Functionally, "receives," "possesses," and "transports" perform the same grammatical role: they are all transitive verbs in parallel construction, separated by commas, that immediately precede the adverbial phrase "in commerce or affecting commerce." The verbs are closely related in content. Each deals with slightly different, but overlapping, actions with respect to a firearm. The relationship of the terms in *Bass* is particularly tight because of the overlap among the elements. That is, one can hardly receive a firearm without possessing it, or transport it without having somehow received it or without possessing it, at least constructively. The application of the final modifier to each element is natural because there is no syntactic or substantive reason to restrict the scope of the modifying phrase.

Here, the list "aggravated sexual abuse, sexual abuse, or abusive sexual conduct" is likewise integrated. Grammatically, the list is a single series of three noun phrases in parallel construction, appearing next to each other and separated by commas, that immediately

precede the postpositive modifier "involving a minor or ward."[2] Substantively, all three terms describe iterations of the same basic conduct, unlawful or wrongful sexual behavior. Like the list in *Bass*, the list of state-law predicates in § 2252(b)(2) reads sensibly if one applies the series-qualifier rule. *See also, e.g.*, *Porto Rico Ry.*, 235 U.S. at 346 (statutory list was series of parallel noun phrases, separated by commas, all describing classes of federal-court litigants); *Paroline*, 134 S. Ct. at 1720 (series of parallel noun phrases, separated by semicolons, all referring to financial losses that a victim of a child-pornography offense might incur).

The similarity of the terms reinforces the conclusion that "involving a minor or ward" must modify all of them. Congress did not define "aggravated sexual abuse," "sexual abuse," or "abusive sexual conduct" for purposes of § 2252, so they carry their "'ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Numerous courts of appeals have so recognized. *See, e.g.*, *United States v. Hubbard*, 480 F.3d 341, 348 (5th Cir. 2007) (Congress intended terms to be "generic terms, describing generic offenses"). And respondent agrees. *See, e.g.*, Brief of Appellee United States at 15, *United States v. Sinerius*, 504 F.3d 737 (9th Cir. 2007) (No. 06-30327).

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2. Thus, the textual basis for applying the series-qualifier principle is even stronger here than it was in *Paroline*. In that case, the listed items appeared in distinct statutory subparagraphs, § 2259(b)(3)(A)–(E), each separated by a semicolon, with the modifying clause in the last subparagraph, § 2259(b)(3)(F). Here, the terms of the series appear next to each other, separated only by commas, in the very same sentence.

The ordinary meaning of "sexual abuse" is "physical or nonphysical misuse or maltreatment ... for a purpose associated with sexual gratification." *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001). Likewise, because "conduct" is "behavior in a particular situation," *Webster's Third New Int'l Dictionary* 474 (1986), the ordinary meaning of "abusive sexual conduct" is the same as the ordinary meaning of sexual abuse: behavior that entails misusing or maltreating another for purposes of sexual gratification. *See, e.g., United States v. Barker*, 723 F.3d 315, 324 (2d Cir. 2013) (defining "'abusive sexual conduct involving a minor' as 'misuse or maltreatment of a minor for a purpose associated with sexual gratification'"); *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (same). And the ordinary meaning of "aggravated sexual abuse" is "sexual abuse" "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Black's Law Dictionary* 75 (9th ed. 2009) (defining "aggravated"). Each term refers to wrongful sexual behavior.

"Sexual abuse" and "abusive sexual conduct" are thus nearly synonymous as a matter of everyday speech. Moreover, any fine distinction in meaning between the individual terms of the series is eliminated by the broadening statutory phrase "relating to," which modifies each of the elements and binds them together even further as a set. The "ordinary meaning" of "relating to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). Given the broadening effect of that

phrase, any state offense "relating to ... sexual abuse," defined in plain English as misuse or maltreatment for a purpose associated with sexual gratification, *Padilla-Reyes*, 247 F.3d at 1163, will also "relat[e] to ... abusive sexual conduct," defined in the same way, *Barker*, 723 F.3d at 324—and vice versa. *See also, e.g.*, N.Y. Penal Law § 130.00(10) ("'Sexual conduct' means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact."). And logically, any state offense "relating to aggravated sexual abuse" necessarily relates to "sexual abuse." *See United States v. Vado*, 2015 WL 1611337, at *4 n.4 (S.D.N.Y. Apr. 10, 2015). Because Congress deliberately used the term "relating to" as a preface to the list of state sexual-abuse offenses, it conceived of them as an interconnected whole. By the same token, it intended the final modifier "involving a minor or ward" to qualify the entire preceding entity.

Where Congress uses overlapping terms such as "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct," this Court treats them as a unit, with any final modifier applied to the whole. *See, e.g., United States v. Olano*, 507 U.S. 725, 732 (1993) (construing phrase "[p]lain errors or defects affecting substantial rights" in former Fed. R. Crim. P. 52(b), treating related words "errors" and "defects" as identical terms meaning "error," and holding that both terms were modified by "affecting substantial rights").

3. Applying the series-qualifier principle here comports with ordinary English usage.

Applying the series-qualifier principle here respects not just the rules of syntax and this Court's precedents but ordinary English usage. In practice, when a final modifier makes sense with every preceding term, and those terms are closely related to one another, the rule comports with how people speak and legislators write. For example, a sign at a lake may allow "swimming, boating, or fishing before sunset only." Any visitor would understand that the limiting phrase "before sunset only" modifies all three water activities (not just fishing), so that nighttime swimming and boating are also prohibited. Or a restaurant menu may offer a lunch special consisting of a "cheeseburger, hamburger, or turkey burger with fries." Diners would expect fries to come with any of the three burgers, not just the last. On the other hand, if the listed foods were not closely integrated—"a bowl of soup, a salad, or a hamburger with fries," for example—the final modifier would not apply to all, and it is doubtful anyone would expect fries with her soup.[3]

In everyday speech, no one would anticipate the wooden application of the last-antecedent rule that respondent has advanced and that, in the example of the three burgers, would provide fries only with a turkey burger. The last-antecedent rule, though "'quite sensible as a matter of grammar,'" *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Nobelman v. American Sav. Bank*,

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3. The Pledge of Allegiance ends with the phrase "with liberty and justice for all." 4 U.S.C. § 4. Even grade-school students instinctively understand that liberty, not only justice, is "for all."

508 U.S. 324, 330 (1993)), must often yield to context and "other indicia of meaning." *Id.*[4] Groucho Marx famously said, "One morning I shot an elephant in my pajamas. How he got into my pajamas I don't know." *Animal Crackers* (Paramount 1930). The quip draws laughs precisely because our ears understand that Groucho, not the elephant, was in pajamas.

4. Had Congress intended "involving a minor or ward" to modify only "abusive sexual conduct," the statute would read differently.

Congress intended "involving a minor or ward" to modify the entire preceding three state-law categories of sexual abuse. Had Congress meant for "involving a minor or ward" to modify only "abusive sexual conduct," it could easily have drafted the statute to say so, in at least two alternative ways.

First, Congress could have placed "abusive sexual conduct involving a minor or ward" first in the series. Thus drafted, the enhanced penalties of § 2252(b)(2) would apply to a defendant convicted of a prior state offense "relating

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4. Though the parties and the lower court referred to the last-antecedent rule, the more appropriate term in these circumstances may be the rule of the "nearest reasonable referent." *See Reading Law* 152–53 (noting that, "[s]trictly speaking, only pronouns have antecedents"). The nearest-reasonable-referent rule provides: "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." *Id.* at 152. That rule does not assist respondent any more than the last-antecedent rule because the terms of the series here *are* parallel.

to abusive sexual conduct involving a minor or ward, aggravated sexual abuse, or sexual abuse." *See Reading Law* 149 ("To make certain that the postpositive modifier does not apply to each item, the competent drafter will position it earlier[.]").

Second, Congress could have set the phrase "abusive sexual conduct involving a minor or ward" apart from the other items in the series by inserting "to" before "abusive sexual conduct." *See id.* at 149–50 (discussing how a legislature might use the word "to" or other words to "set the last phrase apart"). Thus drafted, the statute would encompass prior state convictions under laws "relating to aggravated sexual abuse, sexual abuse, or *to* abusive sexual conduct involving a minor or ward," thereby making clear that the modifier applies only to "abusive sexual conduct."

Congress's decision to employ neither of these drafting options reinforces the conclusion that "involving a minor or ward" modifies the entire preceding series of state-law predicates. *See, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) ("Had Congress intended the [construction urged by respondents], it easily could have drafted language to that effect.").[5]

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5. Of course, Congress could have eliminated any dispute about its intent to limit all state sex-abuse predicates to crimes involving children or wards by repeating the modifier "involving a minor or ward" after each item in the series. That is, Congress could have expressly included prior state offenses "relating to aggravated sexual abuse involving a minor or ward, sexual abuse involving a minor or ward, or abusive sexual conduct involving a minor or ward." Congress understandably chose to avoid that cumbersome locution by simply placing "involving a minor or

B. The statutory context, structure, and history confirm that "involving a minor or ward" modifies the entire series of state-law predicates.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 2252(b)(2)'s context and the overall scheme of federal child-pornography laws confirm that the phrase "involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." Specifically, in § 2252(b)(2) and neighboring provisions, Congress treated prior federal and state convictions differently, limiting the latter to crimes against children. Contrary to the Second Circuit's view, Congress's design is rational, deliberate, and administrable.

1. Convictions for several enumerated federal offenses constitute § 2252(b)(2) predicates, but state-law convictions for the same conduct qualify only if they involve children.

Section 2252(b)(2), like its neighboring penalty provisions, §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2), contains a basic punishment and a recidivist enhancement. In all four paragraphs, the recidivist enhancement applies to a defendant with a prior conviction under enumerated federal statutes or under state laws "relating to" generic

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ward" at the end of the series, in accordance with the series-qualifier principle.

forms of sexual misconduct. It is true today, and has been true at all times since these provisions were enacted, that the qualifying federal convictions encompass more conduct than their state-law counterparts. In particular, Congress has provided that several enumerated federal predicates may involve adults or children, while limiting the analogous state-law predicates to offenses involving children. Far from being "unreasonable" or "strange," as the Court of Appeals fretted, JA 20–21, that is an intentional feature of this statutory scheme.

For example, the list of qualifying federal offenses in § 2252(b)(2) (and §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2)), includes crimes under chapter 71 of Title 18 (entitled "Obscenity"). Chapter 71 punishes, among other things, selling, mailing, importing, broadcasting, producing, and distributing by cable or subscription television obscene matter. §§ 1461–66, 1468. By their terms, these statutes do not require the obscene matter to involve children. But § 2252(b)(2) does not enhance a defendant's sentence based on a prior state conviction for disseminating obscene materials that depict adults, even though many states have such laws. *See, e.g.*, Ariz. Rev. Stat. § 13-3502 (production, publication, sale, possession, and presentation of obscene items); Ind. Code Ann. § 35-49-3-1 (sale, distribution, or exhibition of obscene matter); Nev. Rev. Stat. § 201.249 (production, sale, distribution, exhibition, and possession of obscene items). Rather, to trigger § 2252(b)(2)'s mandatory minimum (or the mandatory minimums in §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2)), a defendant must have "a prior conviction under the laws of any State relating to ... the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of *child* pornography." (emphasis added). Thus, a defendant convicted under federal law for disseminating obscene

adult pornography would face § 2252(b)(2)'s mandatory minimum, but a defendant convicted under state law for disseminating the same pornography would not.

Similarly, §§ 2252(b)(1) and 2252A(b)(1) provide that a conviction under chapter 117 (the current version of the Mann Act) or under § 1591, which criminalize sex trafficking of both adults and children, is a federal predicate. Even though many states likewise prohibit sex trafficking of both adults and children, *see, e.g.*, N.Y. Penal Law § 230.34; W. Va. Code § 61-2-17, Congress limited state-law predicates in §§ 2252(b)(1) and 2252A(b)(1) to "sex trafficking of children." Again, a defendant convicted under federal law of operating an adult prostitution business would be subject to a mandatory minimum penalty, but a defendant convicted under state law of doing the same would not.[6] Hence the manifest error of the courts of appeals that have observed that "it would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior federal conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated federal offenses, the victim had to be a minor." *E.g.*, *United States v. Rezin*, 322 F.3d 443,

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6. Other enumerated federal offenses lack any sexual element altogether, and thus correspond to no state-law predicates, confirming that Congress intended no parity between the groups. *See, e.g.*, 18 U.S.C. §§ 1464 (in chapter 71, broadcasting indecent but not necessarily sexual material); 2258 (in chapter 110, failing to report child abuse, including non-sexual physical abuse).

448 (7th Cir. 2003) (quoted in JA 20–21). That result is anything but "strange." It is just what Congress provided.[7]

Section 2252 has treated prior federal and state convictions differently as long as the statute has been on the books. From its enactment in 1978 until 1996, § 2252(b)(2) did not include any state predicates, even though it included federal predicates that corresponded to common state-law offenses. For example, on enactment in 1978, § 2252 (which at the time prohibited only the distribution of child pornography) included a recidivist enhancement for a defendant with "a prior conviction under this section." Protection of Children Against Sexual Exploitation Act of 1977, § 2(a), Pub. L. No. 95-225, 92 Stat. 7, 8 (1978). But Congress included no enhancement for prior state-law distribution convictions, even though many states prohibited such conduct at that time. *See* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Judiciary Comm., 95th Cong., 1st Sess., at 326–28 (1977) (survey by National Conference of State Legislatures). And in 1994, Congress enlarged the set of federal predicates to include offenses under chapters 109A and 110 of Title 18—which generally include

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7. Congress has shown that it can achieve perfect congruence between state and federal predicate offenses in recidivist provisions. *See, e.g.*, § 2426(b)(1) (a "prior sex offense conviction" that exposes defendant to heightened sentencing range for chapter 117 conviction is an offense under enumerated federal statutes or "under State law for an offense consisting of conduct that would have been" an enumerated federal offense "if the conduct had occurred within the special maritime and territorial jurisdiction of the United States"). Notably, this provision was part of the same legislation that added "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" to §§ 2252(b)(2) and 2252A(b)(2). Protection of Children from Sexual Predators Act of 1998, § 104(a), Pub. L. No. 105-314, 112 Stat. 2974, 2976.

sexual-abuse and child-pornography offenses—but again, not state convictions for the same crimes. Violent Crime Control and Law Enforcement Act of 1994, § 160001(d), Pub. L. No. 103-322, 108 Stat. 1796, 2037.

Not only has Congress always distinguished between prior federal and state convictions, it has done so by requiring the latter to involve children. That design appears in the first legislation to include state-law predicates, the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208, 110 Stat. 3009. Indeed, the CPPA has particular relevance to the question presented because it also added the language at issue here—"a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—to the U.S. Code for the first time. The CPPA added state-law recidivist enhancements to §§ 2251, 2252, and 2252A. For production of child pornography, § 2251, the CPPA provided an enhanced sentence for defendants with prior state convictions "relating to the sexual exploitation of children." CPPA subsection 4, 110 Stat. at 3009-30. For simple possession of child pornography, §§ 2252(b)(2) and 2252A(b)(2), the CPPA provided an enhanced sentence for defendants with prior state convictions "relating to the possession of child pornography." CPPA subsection 5, 110 Stat. at 3009-29 to 3009-30. And for defendants convicted of receiving or distributing child pornography, §§ 2252(b)(1) and 2252A(b)(1), the CPPA mandated an enhanced sentence for prior state convictions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." CPPA subsection 5, 110 Stat. at 3009-30.[8]

8. That language was added to §§ 2252(b)(2) and 2252A(b)(2) in 1998. Protection of Children from Sexual Predators Act of

These provisions "are best analyzed together, owing to their contemporaneous enactment and the similarity of their pertinent language." *Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000). When they are, they indicate that all the state-law predicates involve crimes against children. It is not a reasonable reading of these contemporaneously enacted provisions that Congress limited the state-law predicates for production and simple possession of child pornography to crimes against children, while treating the predicates for receipt and distribution of child pornography differently. Rather, the more logical inference is that Congress limited all state-law predicates to offenses involving minors (and wards, who, like minors, are vulnerable to sexual abuse and are incapable of consenting to sex by virtue of their status).

2. Congress sensibly decided to treat federal and state convictions differently.

The decision to treat prior federal and state sex-abuse convictions differently also makes sense. Congress, familiar with its own criminal statutes, knew what conduct it was capturing under federal law and could be confident that all covered federal offenses were proper predicates. But Congress did not have the same familiarity with the varied and mutable sexual-abuse laws of all fifty states. *See, e.g.*, *Acosta v. Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003) (Alito, J.) (noting that Congress is "[f]amiliar with the operation of the federal criminal justice system" but generally less familiar with the operation of "state

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1998, § 202(a)(2), Pub. L. No. 105-314, 112 Stat. 2974, 2978. *See infra* pp. 31–33.

criminal justice systems"). Consequently, Congress may have been concerned that individual states could criminalize relatively low-level conduct that, broadly speaking, "relat[es] to ... sexual abuse" but does not categorically warrant the severely enhanced penalties of § 2252(b) unless it involves a minor.

Many states, for example, punish as misdemeanors public lewdness or indecent exposure in the presence of others. *See, e.g.*, Ohio Rev. Code Ann. § 2907.09(A)(1) (exposing private parts "under circumstances in which the person's conduct is likely to be viewed by and affront others" is a fourth-degree misdemeanor punishable by 30 days in jail). Congress could have reasonably concluded that these and similar state misdemeanor offenses, which arguably "relat[e] to ... sexual abuse" because they entail "misuse" or "maltreatment" of bystanders to gratify the actor sexually, *see Padilla-Reyes*, 247 F.3d at 1163, do not warrant § 2252(b)(2)'s severe mandatory minimum sentence unless they involve children. That would explain why Congress decided to adopt a floor: qualifying state predicates must not only relate to behavior that is sexual and abusive but must, to ensure that they capture sufficiently culpable and dangerous recidivists, "involv[e] a minor or ward."

Congress may also have chosen to minimize the administrative burden associated with applying these penalty provisions. This Court has noted the difficulty, under the categorical approach, of comparing prior state convictions to generic federal terms such as "sexual abuse." *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (citing interpretations of prior state convictions that are "anything but evenhanded, predictable, or consistent").

For example, under respondent's approach, a federal court confronted with a prior state conviction for cyberstalking involving threats of sexual assault against an adult, *e.g.*, 720 Ill. Comp. Stat. 5/12-7.5(a-3)(1)–(2), would have to decide whether that offense "relat[ed] to ... sexual abuse," in which case it would qualify as a § 2252(b) predicate, or "relat[ed] to ... abusive sexual conduct," in which case it would not. The same taxonomic problem would arise with respect to, say, state convictions under so-called "revenge porn" laws criminalizing the dissemination of another's (consensually obtained) nude photos without that person's consent, *e.g.*, Wis. Stat. § 942.09(3m)(a)(2). Congress can sensibly have decided against embroiling federal courts in such indeterminate line-drawing exercises or inviting arbitrary results across jurisdictions. Limiting all state predicates to crimes involving children makes this inquiry far easier: there is no doubt that threatening a child with sexual assault or publishing an adolescent's nude photos online "relat[e] to" both "sexual abuse" and "abusive sexual conduct."

C. Petitioner's natural reading of the statute comports with the contemporary understanding of Congress and the Department of Justice.

At the time of enactment, both Congress and the Department of Justice (DOJ) understood the statutory language the way petitioner does. That shared understanding further demonstrates that petitioner's reading is both natural and correct. *See, e.g.*, *Roadway Express v. Piper*, 447 U.S. 752, 759 (1980) (construing statutory term in light of "contemporaneous understanding").

As noted, the language that now appears in § 2252(b)(2) —referring to a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—was first introduced into the U.S. Code in 1996 as part of the CPPA (in §§ 2252(b)(1) and 2252A(b)(1)).

Congress's overarching concern in enacting the CPPA was to protect child victims from the "vicious cycle of child sexual abuse and exploitation" in which "[c]hild pornography plays a critical role." S. Rep. No. 104-358, 1996 WL 506545, at *12. In particular, Congress perceived a link between child pornography and sex offenses against minors. *See* CPPA subsection 1(3), (4), 110 Stat. at 3009-26 (finding that "child pornography is often used as part of a method of seducing other children into sexual activity" and that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites"). Accordingly, Congress indicated that the specific statutory purpose for the enhanced penalties set forth in § 2252 was to incapacitate repeat offenders with prior convictions under certain federal laws or "under *any State child abuse law* or law relating to the production, receipt, or distribution of child pornography." S. Rep. No. 104-358, 1996 WL 506545, at *9 (emphasis added). The statutory purpose was to enhance sentences of federal offenders who had previously violated "State child abuse" laws and thus posed a particular risk of using child pornography to harm children.[9]

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9. The Court of Appeals dismissed this history solely because it was "brief" (JA 24), but that is no basis for ignoring probative evidence of legislative intent. *See Kaiser Aluminum & Chem. Corp.*

Notably, in 1998, DOJ, addressing Congress, construed the language at issue here—"a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—and gave it the same natural reading advanced by petitioner. As discussed earlier, *see supra* p. 26, this language first appeared in 1996, when it was added to §§ 2252(b)(1) and 2252A(b)(1), which penalize receipt and distribution of child pornography—but not to §§ 2252(b)(2) and 2252A(b)(2), which penalize simple possession of such material. (The pre-1998 versions of §§ 2252(b)(2) and 2252A(b)(2) contained recidivist enhancements only for state-law offenses "relating to the possession of child pornography.") In 1998, DOJ urged Congress to harmonize the penalties for receipt and distribution, on the one hand, and possession on the other. In a letter to the House Judiciary Committee setting forth "the views of the Department of Justice" on the bill that became the Protection of Children from Sexual Predators Act of 1998, DOJ wrote:

> [W]hile there is a 5-year mandatory minimum sentence for individuals charged with receipt or distribution of child pornography and who have *prior state convictions for child molestation* (18 U.S.C. §§ 2252(b)(1) and 2252A(b)(1)), there is no enhanced provision for those individuals charged with possession of child pornography who have *prior convictions for child abuse.* (18 U.S.C. §§ 2252(b)(2) and 2252A(b)(2) provide only for increased minimums for state

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v. Bonjorno, 494 U.S. 827, 839–40 (1990) (relying on "brief legislative history" to interpret a statute).

> convictions for possession.) We suggest an increased mandatory minimum sentence of 2 years for individuals charged with a violation of any subsection of 2252 or 2252A, if the individual had a prior conviction for sexual abuse *of a minor.*

H.R. Rep. 105-557, 1998 WL 285821, at *3, *31 (emphases added).

The Justice Department thus interpreted the statutory phrase "a prior conviction under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" as synonymous with "prior state convictions for *child* molestation." *Id.* at *31 (emphasis added). That contemporaneous interpretation is "persuasive evidence of the original understanding" of the phrase. *United States v. Bd. of Comm'rs*, 435 U.S. 110, 131 (1978). And the Justice Department asked Congress to harmonize the penalty provisions by enhancing offenses under §§ 2252 and 2252A "if the individual had a prior conviction for sexual abuse *of a minor*." H.R. Rep. 105-557, 1998 WL 285821, at *31 (emphasis added). Congress responded by adding the statutory phrase in §§ 2252(b)(1) and 2252A(b)(1)—"a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—to §§ 2252(b)(2) and 2252A(b)(2) as well.

The implication of this inter-branch dialogue is unmistakable. DOJ understood that only state offenses relating to the abuse of *children* qualified as predicates for the receipt and distribution of child pornography. It asked

Congress to bring the state predicates for possession of child pornography into alignment. And Congress did so by making the categories of state-law predicates identical. By far the likeliest inference is that Congress shared DOJ's understanding of the relevant statutory language.

D. The Second Circuit's decision is wrong.

In holding that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," the Court of Appeals committed several errors. The court: (1) wrongly assumed that Congress did not intend to treat prior federal and state convictions differently under § 2252(b)(2); (2) invoked the rule against surplusage to reject petitioner's reading, when that rule has no application to a statute like this one in which surplusage is unavoidable; and (3) relied on an illusory parallel between the titles of the federal sex-abuse crimes in chapter 109A and the generic state-law sex-abuse offenses listed in § 2252(b)(2).

1. The court relied on the false "assumption" that Congress intended to treat prior federal and state convictions equally.

The Second Circuit rested its holding largely on "the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law." JA 23. Indeed, this assumption "compel[led]" the court's holding, and other courts of appeals have followed the same mistaken path. *See* JA 22–23 (collecting cases). The court did not substantiate this "assumption," and it is incorrect. As we have already shown, Congress's intent to treat prior federal and state convictions differently—and

to limit the state predicates to crimes involving children—is a salient feature of this statutory scheme.

2. The court relied incorrectly on the rule against surplusage.

The Court of Appeals also opined that reading the state categories of sexual abuse as an integrated and related list modified by the final phrase "involving a minor or ward," "may run up against" the rule against surplusage (JA 17), which requires that "every clause and word of a statute should, if possible, be given effect." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (citations and internal quotation marks omitted). But the surplusage canon has force only when a competing interpretation would give effect to every word, which is not possible here. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). Thus, the surplusage rule does not undermine petitioner's reading. In fact, as discussed earlier, *see supra* pp. 15–18, the redundancy and overlap of the terms in the series at issue makes application of the series-qualifier principle especially appropriate.

The surplusage rule, by its terms, is not "absolute." *Id.* (citing *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.")). The Second Circuit's reliance on the rule was misplaced, for two reasons.

First, the rule "assists only where a competing interpretation gives effect to every clause and word of a statute." *Marx*, 133 S. Ct. at 1177 (citation and internal

quotation marks omitted). Here, no interpretation gives effect to every statutory word. Even on respondent's reading, for example, "aggravated sexual abuse" is redundant because every offense "relating to" it necessarily relates to "sexual abuse" as well. *See Vado*, 2015 WL 1611337, at *4 n.4 (recognizing this redundancy).

Second, redundancy is hardly unusual in statutory lists of the sort at issue here, for "'Congress often uses multiple words with overlapping meaning to capture a broad swath of conduct.'" *United States v. Shrader*, 675 F.3d 300, 311 (4th Cir. 2012) (quoting *United States v. Laureys*, 653 F.3d 27, 41 (D.C. Cir. 2011)). Indeed, in this very statute, Congress used redundant language in describing other state-law predicates: the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." § 2252(b)(2). Congress also included as state predicates prior convictions relating to "sex trafficking of children" even though such convictions would seem to be encompassed by convictions "relating to ... abusive sexual conduct involving a minor or ward." §§ 2252(b)(1) and 2252A(b)(1). Surplusage is thus unavoidable in this statute, making the Second Circuit's reliance on the surplusage canon inappropriate. *See Moskal*, 498 U.S. at 120 (Scalia, J., dissenting) (noting that the surplusage rule should not "be applied to the obvious instances of iteration to which lawyers, alas, are particularly addicted—such as 'give, grant, bargain, sell, and convey[.]'").

3. The court relied on a presumed structural parallel that does not exist.

The Court of Appeals also relied on an illusory parallel between the three listed categories of generic state-law

sex-abuse offenses in § 2252(b)(2) ("aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward") and the titles of three of the four federal sex crimes defined in 18 U.S.C. §§ 2241 (titled "aggravated sexual abuse"), 2242 (titled "sexual abuse"), 2243 (titled "sexual abuse of a minor or ward"), and 2244 (titled "abusive sexual contact"). The court noted that "adult and minor victims are included under the first two provisions, while Section 2243 covers only minors and wards," and theorized that, though "the language used in § 2252(b)(2) is not identical to these statutory titles, it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement." JA 23.

The court's conclusion is unsound for several reasons. First, Congress did not intend the state sex-abuse predicates in § 2252(b)(2) to be defined by reference to the federal sex-abuse crimes in chapter 109A. *See, e.g.*, *Hubbard*, 480 F.3d at 348 (holding that the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" in § 2252A(b)(1) are "generic terms, describing generic offenses" without reference to the federal offenses defined elsewhere in the United States Code); *see also, e.g.*, *Barker*, 723 F.3d at 324; *Sonnenberg*, 566 F.3d at 671. Respondent has repeatedly acknowledged in the lower courts that the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct," as used in §§ 2252(b) and 2252A(b), should be interpreted in accordance with their ordinary meaning, rather than, for example, by reference to §§ 2241–44. *See, e.g.*, Brief of Appellee United States at 15, *Sinerius*, 504 F.3d 737 (No. 06-30327) ("[T]here is not the slightest hint in the statutory text that Congress sought to measure state

offenses by [reference to] federal sex crimes."); Appellee's Brief at 11, *Sonnenberg*, 556 F.3d 667 (No. 08-1197) ("There is no indication that Congress sought to measure state predicate offenses by the definition of federal sex crimes found in any of the referenced chapters [of the United States Code].")

Second, the language and structure of the federal sex-abuse offenses listed in chapter 109A do not parallel the state offenses listed in § 2252(b)(2) in the way the court suggested. For example, chapter 109A includes four federal sexual-abuse crimes ("aggravated sexual abuse" (§ 2241), "sexual abuse" (§ 2242), "sexual abuse of a minor or ward" (§ 2243), and "abusive sexual contact" (§ 2244)). But § 2252(b)(2) lists only *three* categories of state sex-abuse offenses ("aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward") qualifying for the enhancement. And the third category differs from the titles of the third and fourth federal sexual-abuse crimes listed in chapter 109A, §§ 2243 ("sexual abuse of a minor or ward") and 2244 ("abusive sexual contact").

The Court of Appeals appears to have assumed that "abusive sexual conduct involving a minor or ward" corresponds to the federal crime of "sexual abuse of a minor or ward," § 2243. But that assumption begs the question: it rests on the premise that "involving a minor or ward" in § 2252(b)(2) modifies only "abusive sexual conduct," the very issue in dispute. If the modifier applies to the entire series, the parallel perceived by the court evaporates. And the term "abusive sexual conduct" in § 2252(b) more closely resembles the federal crime of "abusive sexual contact," § 2244, which, like "aggravated

sexual abuse" (§ 2241) and "sexual abuse" (§ 2242) can be committed against *both* minors and adults. Accordingly, to the extent any parallel exists, it suggests that Congress intended "involving a minor or ward" to modify and limit *all three* listed state categories of abusive sex ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct"), not just the last one.[10] For all these reasons, the parallel perceived by the Court of Appeals is chimerical.

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In sum, the best reading of § 2252(b)(2)'s language, construed in light of the series-qualifier principle, basic

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10. The Court of Appeals also saw a parallel between the list of state-law predicates in § 2252(b)(2) and the list in § 2251(e) ("aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children"). The court noted that, in § 2251(e), "aggravated sexual abuse, sexual abuse, and abusive sexual conduct [*sic*] do not form their own separate list ending in a common modifier; rather, 'abusive sexual contact involving a minor or ward' is the third element of a four-element list[.]" JA 16 n.3. The court "assume[d] that Congress intended § 2251(e)'s similar language to be read in tandem with § 2252(b)(2)," which "suggests that the series qualifier canon should not be applied" to § 2252(b)(2). JA 17 n.3. But the quoted language was added to § 2251(e) in 2006, a decade after similar language appeared in § 2252(b). *See* Adam Walsh Child Protection and Safety Act of 2006, § 206(b)(1)(B), Pub. L. No. 109-248, 120 Stat. 587, 614. And "the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight." *United States v. X-Citement Video*, 513 U.S. 64, 77 n.6 (1994). Moreover, § 2251(e)'s language differs from § 2252(b)(2)'s, and "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted).

English usage, and the statutory context, structure, and history, is that "involving a minor or ward" modifies not only "abusive sexual conduct" but "aggravated sexual abuse" and "sexual abuse" as well. Since petitioner's prior state conviction indisputably did not relate to an offense "involving a minor or ward," he should be resentenced without regard to any mandatory minimum punishment.

II. If an ambiguity remains, the rule of lenity resolves it in petitioner's favor.

If, despite the preceding analysis, this Court retains a doubt as to the meaning of § 2252(b)(2), the rule of lenity resolves the dispute in petitioner's favor. Respondent's interpretation is, at best, highly doubtful, and in a criminal case, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 348; *accord Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[W]e have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Accordingly, the enhanced minimum and maximum sentences of § 2252(b)(2) do not apply to petitioner.

A. The rule of lenity requires that ambiguous criminal laws be interpreted to favor the defendant.

This Court has long recognized that the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). "The rule that penal laws are to be construed strictly, is perhaps

not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals[.]" *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The rule of lenity means that once other legitimate tools of interpretation have been exhausted, and an ambiguity remains, the Court resolves the ambiguity in the defendant's favor. *See United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). Thus, where "a reasonable doubt persists about a statute's intended scope" the rule of lenity compels this Court to adopt the more lenient interpretation. *Moskal*, 498 U.S. at 108; *see Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[P]rinciples of lenity ... demand resolution of ambiguities in criminal statutes in favor of the defendant[.]").

Presented with a criminal statute of ambiguous meaning, courts do not choose the harsher alternative unless Congress has "'spoken in language that is clear and definite.'" *Bass*, 404 U.S. at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)). At least two concerns animate this policy. First, the legislature would not impose criminal punishment without making clear what conduct incurs the punishment and what the punishment will be. Thus, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Second, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation

of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95. "This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348 (quoting Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (Univ. of Chicago Press, 1967)).

The rule of lenity applies "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing[.]" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (citation omitted). Thus, where "any ambiguity survives," this Court will "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *Id.*; *see Bifulco v. United States*, 447 U.S. 381, 387 (1980) (rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"); *Granderson*, 511 U.S. at 42–43 (applying rule of lenity to interpret a penalty provision to avoid an increase in sentence).

B. Section 2252(b)(2) should not be employed to increase petitioner's sentence because the government has not shown that the statute's recidivist enhancement unambiguously applies to him.

The rule of lenity applies with particular force to a case such as petitioner's, which involves a statute that imposes a mandatory minimum sentence of ten years in

prison, and increases the maximum sentence from ten to twenty years. *See Dean v. United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting) (explaining that the rule of lenity has "special force in the context of mandatory minimum provisions"). It has been "uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). In the vast majority of federal criminal cases, the sentencing court is directed to impose a sentence sufficient, but not greater than necessary, to accomplish the purposes of criminal punishment in light of the facts of the particular crime and the history and characteristics of the particular defendant. *See* 18 U.S.C. § 3553(a). In contrast, enactment of a mandatory minimum sentence means that Congress has decided to forgo the usual goals of individualized sentencing. It has decided instead that a perceived need for greater incapacitation or deterrence outweighs the need for individualized sentencing. Such laws carry a substantial risk of injustice. They substitute a one-size-fits-all approach for the fundamental premise of just and proportionate sentencing. They also strip the judiciary of much of its discretion to determine a fair and reasonable sentence.[11] *See Dean*, 556 U.S. at 584–85 (Breyer, J., dissenting).

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11. In petitioner's case, the District Court determined that the advisory range of imprisonment under the Sentencing Guidelines is 78–97 months, which takes petitioner's prior conviction into account. JA 46. The District Court could then have imposed a greater or lesser sentence based upon the factors in 18 U.S.C. § 3553(a). *See United States v. Booker*, 543 U.S. 220 (2005). Without the enhancement, the maximum prison sentence would have been ten years, which became the minimum sentence after the enhancement.

A decision to apply the enhanced penalties of § 2252(b)(2) to cases such as petitioner's, when the penalties do not unambiguously apply, will have a serious and negative impact both on individual defendants and on our system of just and proportionate sentencing. The rule of lenity eliminates that risk. Rather than condemn petitioner to ten years in prison when Congress has not clearly mandated it, the rule of lenity requires that the decision of the Court of Appeals be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

EDWARD S. ZAS
Counsel of Record
BARRY D. LEIWANT
DANIEL HABIB
DARRELL B. FIELDS
FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8742
edward_zas@fd.org

Counsel for Petitioner

DAVID A. LEWIS
Of Counsel

APPENDIX — RELEVANT STATUTES

18 U.S.C. § 2251. Sexual exploitation of children.

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly

permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)

(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such

conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)

(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use

of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than

15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

Appendix

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not

more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative Defense.— It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

18 U.S.C. § 2252A. Certain activities relating to material constituting or containing child pornography.

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate

or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or

knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor. [1]

shall be punished as provided in subsection (b).

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under

the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)

(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall

be available in any prosecution that involves child pornography as described in section 2256 (8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative Defense.— It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each

such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of Evidence.— On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil Remedies.—

(1) In general.— Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) Relief.— In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child Exploitation Enterprises.—

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.